Victim Impact in Capital Cases:
Pandora's Box Now Open

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I.

On April 29, 1999, A.R.S. § 13-703(C) was amended to permit victim impact evidence. The change reads:

> In evaluating mitigating circumstances, the court shall consider any information presented by the victim regarding the murdered person and the impact of the murder on the victim and other family members. The court shall not consider any recommendation made by the victim regarding the sentence to be imposed. A victim may submit a written impact statement, an audio or video tape statement or make an oral impact statement to the probation officer preparing the presentence report. The probation officer shall consider and include in the presentence report the victim impact information regarding the murdered person and the economical, physical and psychological impact of the murder on the victim and other family members. The victim has the right to be present and to testify at the sentencing hearing. The victim may present information about the murdered person and the impact of the murder on the victim and other family members.

The amendment opens the door to evidence of physical, emotional, and psychological impact of the murder on the victim and the other family members; however, nowhere does it discuss what is proper impact evidence, the burden of proof, or whether the Rules of Evidence apply when the state introduces it. Thus, the legislature has opened up "Pandora's Box." With this amendment it would appear that the legislature is finally filling the gap after the Supreme Court found that the Eighth Amendment erects no *per se* barriers to this kind of evidence in *Payne v. Tennessee*.[1] However, the method that they chose to use creates constitutional problems which were not addressed in *Payne*.

In *Payne*, the evidence of victim impact was admitted in rebuttal to evidence presented by the defense including the fact Payne was a churchgoing person who did not drink and cared for children, thereby showing the crimes were inconsistent with his character. Further, the prosecutor used it to bolster his argument why the crime was especially cruel, heinous, and atrocious or, in other words, why he had proven one of the aggravating factors. It was not admitted pursuant to a statute or a rule. The Tennessee Supreme Court found it to be "technically irrelevant" but concluded it was harmless error. The U.S. Supreme Court affirmed, finding that the Eighth Amendment does not erect any *per se* barriers to this evidence.

Under the legislative amendments, rather than just say that the court could consider this

evidence, they chose to wrap it around the court's specific consideration of mitigating circumstances. In so doing, they created problems of constitutional dimensions. Before looking at the problems, one must first look at the way the court viewed this evidence after the *Payne* decision. Victim impact information was not relevant to any aggravating factor and therefore legally inadmissible. In *State v. Bolton*,[2] the court stated:

> Defendant argues that admission of these statements violated his right to due process of law and his right against infliction of cruel and unusual punishment. We acknowledge that family testimony concerning the appropriate sentence may violate the Constitution if presented to a capital sentencing jury. See, *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991); *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987). We also acknowledge that victim impact testimony is not relevant to any of our statutory aggravating factors. *Atwood*, 171 Ariz. at 656, 832 P.2d at 673.

These principles were reaffirmed in *State v. Williams*.[3] It is clear from these cases that the court took the same approach that the Tennessee Supreme Court did. In both cases, the court did not reverse the sentencing, nor did the court remand for further re-sentencing. In *Williams*, then Chief Justice Feldman specially concurring made the following comments:

> I believe the time is near for the court to take a position forbidding the introduction of evidence calculated to influence the sentencing judge in a manner forbidden by the law. It should not be offered by the prosecution or permitted by the court.[4]

II.

The legislature, in its amendment, has sought to create a rule of evidence to allow impact evidence when the court considers mitigating circumstances. Obviously the legislature still believes it is not relevant on any aggravating circumstances. It certainly could have said "in considering aggravating circumstances." The legislature could have created a new aggravating factor similar to A.R.S. § 13-702(C)(9).[5] The legislature could have used language which stated the court generally should consider it similar to the provisions of A.R.S. § 13-702(E).[6] However, the legislature stated that the only place where the court is to consider it is in evaluating [weighing] mitigating circumstances. The amendment is silent on what weight the court should give to this evidence and it does not tell the court how it is to evaluate [weigh] it. Is the legislature suggesting that the court not give weight to legitimate statutory mitigating circumstances in a particular case because of the emotional and financial impact of the murder on the family of the victim? What then happens to nonstatutory mitigating circumstances? If that is the case, it violates the very strict requirements of *Lockert v. Ohio*,[7] and *Eddings v. Oklahoma*.[8] These cases make it clear that there can be no modifiers of the obligation of the court to listen to and give weight to mitigating circumstances.

Even before this amendment, when a trial court was weighing the mitigation there was an argument that the Arizona death penalty process may have been defective by precluding the sentencer

[the trial judge] from considering circumstances that may be mitigating yet fail to meet the burden of proof imposed on a defendant. This precludes the sentencing court from weighing evidence of mitigation that, while not satisfying the evidentiary standard, nonetheless may give the sentencer reservations about the appropriateness of imposing a sentence of death. There is a lengthy discussion concerning this issue in *Adamson v. Ricketts.*[9] The court, in *Adamson*, found that this exclusion of relevant evidence at the weighing stage violates the principle established by *Lockett, and Eddings*: a sentencing court must weigh all relevant mitigating evidence against the aggravating circumstances.

Any modifiers which restrict the trier of fact from consideration of any mitigation are unconstitutional. *Penry v. Lynaugh.*[10] In *Penry*, the defense asked for a jury instruction which would have allowed the jury to consider the mental retardation of the defendant. When the trial court refused the instruction, the Court concluded that it could not be sure the jury was able to give effect to the mitigating evidence of mental retardation. In doing so the Court stated:

> Indeed, it is precisely because the punishment should be directly related to the personal culpability of the defendant that the jury must be allowed to consider and give effect to mitigating evidence relevant to a defendant's character or record or the circumstances of the offense. Rather than creating the risk of an unguided emotional response, full consideration of evidence that mitigates against the death penalty is essential if the jury is to give a 'reasoned *moral* response to the defendant's background, character, and crime.'

The issue then becomes: does the amendment to 703(C) create a modifier which precludes the sentencer from giving consideration and weight to what would otherwise be relevant mitigating evidence or does 703(C) reduce the weight that the court might otherwise give mitigating evidence? Clearly, this victim impact evidence does not fit the traditional definitions of a mitigating circumstance.

In order to begin the analysis, one must first look at what is a mitigating circumstance. A.R.S. § 13-703 (G) provides:

> G. Mitigating circumstances shall be any factors proffered by the defendant or the State which are relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record and any of the circumstances of the offense . . .

The following definition of mitigation is what has been used to instruct juries in North Carolina, Mississippi, and California:

> Mitigating circumstances are not intended as a justification or excuse for a killing or to reduce it to a lesser degree of crime than first degree murder. Instead, a mitigating circumstance is a fact or group of facts which has one of two purposes: (1) a mitigating circumstance may extenuate or reduce the moral culpability of this defendant for this crime, or (2) a mitigating circumstance may make the defendant less deserving of the extreme punishment of death. Our law requires consideration of more than just the bare facts of the crime. A mitigating circumstance may stem from any of the diverse

> frailties of humankind. In considering mitigating circumstances, it would be your duty to consider as a mitigating circumstance any aspect of the defendant's background, character, age, education, environment, behavior and habits which make him less deserving of the extreme punishment of death. You may consider as a mitigating circumstance any circumstance which tends to justify the penalty of life imprisonment or that the defendant contends as a basis for a sentence less than death.

Clearly, victim impact information would not be relevant under this definition. If relevant evidence is evidence which has a tendency to make the existence of any fact [statutory or nonstatutory mitigating fact] that is of consequence to the determination [whether to impose death] more or less probable, then it is not relevant on mitigating circumstances. In other words, how would victim impact make a defendant's age under G(5) more probable or less? It could only be used to reduce the weight that the court might give to this factor. The same could be said with regard to "significantly impaired" under G(1). Its impact is only offered to show the "victim is an individual whose death represents a unique loss to society and in particular to his family." *Payne*.[11] It is highly emotional and it serves no relevant purpose other than to appeal to the sympathies or emotions of the judge, as pointed out by Justice Feldman in the *Williams* case. It creates a "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty."[12] Here, the amendment in 703(C) undercuts the mitigation offered by the defendant and/or it is a pure appeal to passion. Either way, it leads to arbitrary, freakish, wanton, and inconsistent results which violate the Eighth and Fourteenth Amendment to the United States Constitution.

Several hypotheticals will illustrate the point. In one case, an elderly man over 70 years old and an owner of a small junkyard in South Phoenix is killed during the course of burglary. His wife of 50 years died earlier in the year, and they have no surviving relatives who would meet the definition of a victim. In another case, an elderly man over 70 years old and an owner of a jewelry store in North Phoenix is killed during a burglary. He is survived by his wife, five children, and 10 grandchildren. He has been active in the community, sponsoring the local little league team and participating in his church both financially and through volunteer work. In each case there are the two aggravating factors of age of the victim and pecuniary gain. In the first case, there is no one to offer impact testimony. In the second, the court hears substantial impact evidence. In both cases, assume the defendant is suffering from a mental illness and/or organic brain damage [similar to the defendants in *State v. Jimenz* and *State v. Stuard*[13]] which the court has found "significantly impaired" his ability to conform his actions to the requirements of law. The court also finds several nonstatutory mitigating circumstances. How is the court to treat the victim impact information? What weight does it have? Is there a likelihood that you would get a different result in the first case? In the second case, if the court reduces the mitigating effect of the substantial impairment because the court found the emotional and financial impact on the North Phoenix victim was substantial, clearly the risk that the court would impose death increases substantially because the mitigating evidence would no longer be "sufficiently substantial to call for leniency." By doing so, the court would then violate the dictates of *Lockett* and *Eddings*. Additionally, the procedure of using victim impact evidence to reduce the weight of a mitigating circumstance has the same impact on the defendant that the refusal to give an instruction had in the *Penry* case. One could only wonder whether the result would be different in *State v. Jimenz* and *State v. Stuard* if the Supreme Court, after considering victim impact evidence, reduced the mitigating impact of the

substantial impairment suffered by these respective defendants. [The trial judge in both cases originally imposed death.]

From these examples, it seems clear that under the procedure in 703(C), the impact information is a modifier of the court's ability to give proffered mitigating evidence its full effect. It creates a grave risk that the sentence is an unguided response to this highly emotional impact evidence and thus the amendment violates the Eighth and Fourteenth Amendment.

III.

Recently, there have been a number of tragic shootings of police officers. Does the status of a person, i.e., a police officer F(10), a child under the age of 15 F(9), or an adult over the age of 70 F(9), have any impact? This sets up a situation where the court finds the state has proven an aggravating factor, i.e., the victim was a police officer or the age of the victim, and the court then considers this same victim impact evidence in weighing the proffered mitigating evidence. In effect, it is double counting the same facts. It carries weight as an aggravator and at the same time reduces the weight of a potential mitigator. Under Arizona law, the court may find two aggravating factors based upon the same facts but it can only weigh them once.[14] Is that possible to do under these circumstances?

A second problem is that if impact information can be used as an aggravator and then to reduce the effect of mitigating evidence, we are moving closer to *de facto* mandatory sentencing for certain classes of victims. In *Roberts v. Louisiana*[15] and *Sumner v. Shuman*,[16] the Supreme Court struck down mandatory sentencing in death cases. A review of those cases shows that the major constitutional problem is that it prevents the sentencer from considering mitigating evidence. It is easy to see that if the same facts, first, are the aggravators and then, secondly, the court uses them to reduce the weight of any mitigation offered, it will be in fact impossible to meet the high burden of proof to show that the mitigation is "sufficiently substantial to call for leniency." In *State v. Herrera*,[17] the court found that a combination of factors called for leniency. The victim was a Maricopa County Deputy Sheriff. If the court reduced the mitigating impact of this combination of factors because of the victim impact evidence, the Supreme Court may not have reduced the death sentence to life imprisonment. In *State v. Williams*,[18] Justice Feldman observed the following:

> We have presumed that the trial judges will ignore such testimony, but one must wonder how accurate such an assumption may be. The sentencing decision in many capital cases is difficult enough without subjecting the trial judge to the emotional pressure of listening to the victims' understandable, but legally inadmissible recommendations, often motivated by the need for catharsis and sometimes by the desire for revenge.

IV.

If there are these constitutional problems with victim impact information, then counsel needs to mount a two-prong attack after the jury has returned a guilty verdict. In the past, victim impact information would be contained by a comprehensive motion to seal the presentence report.[19] Generally, trial judges would not review the presentence report [and the letters from the victims attached to the report] until after the court had prepared and read its findings after the 703 hearing. Now one cannot rest upon the old assumptions.

The first prong is an effective pre-hearing motion practice. A motion *in limine* to preclude victim impact evidence should be filed.[20] It should include the constitutional challenges outlined above, but it also must be fact specific if the case involves one of these class offenses, i.e., police officer, etc. A motion to seal the presentence report should still be filed because presentence reports usually contain recommendations from investigating police officers, friends, neighbors, and others who would not meet the statutory definition of a victim.

The next area is discovery. Counsel should insist that the state in its Rule 15(1)(g) disclosure specify whom they are calling for the purpose of establishing this physical, psychological, and financial impact. Counsel should request interviews when they are not prohibited, and copies of any records which support the victim's family's testimony. While counsel may not interview victims, counsel certainly should have access to any counseling records in order to offer rebuttal evidence provided in A.R.S. § 13-703(C).[21]

The second prong is at the hearing itself. Counsel should request the court to establish whether the Rules of Evidence apply, and what burden of proof applies [the defense must prove mitigation by the preponderance of the evidence]. Counsel should object to foundation under Rules 701 and 702 when witnesses attempt to offer "their opinion."

The key objection is relevancy. How is this evidence relevant to mitigation? How does this make a mitigating fact more or less probable? An essential part of this objection is a request that the court perform a Rule 403 analysis. By definition, this evidence is extremely emotional and thereby prejudicial to a defendant; however, as all defense lawyers know, not all harmful evidence will be found to be prejudicial. Under Rule 403, relevant evidence is excluded if its probative value is substantially outweighed by the danger of undue prejudice. Undue prejudice "means an undue tendency to suggest decision on an improper basis."[22] In this context, a decision to impose death is based upon the impact that the death of the victim had upon the surviving family, and thereby disregarding legitimate mitigation in violation of *Lockett* and *Eddings*.

Lastly, counsel should request that the court, in its special verdict, make specific findings on the victim impact and what weight the court gave it -- most importantly, whether the court used impact information to reduce the weight of any mitigating factor that was proved by the defense. In *State v. Beaty*,[23] the court strongly suggests that the court make very specific findings on each item of mitigation. One can extend this rationale to the court finding on the impact the court has given to the evidence presented by the victim.

V.

This brings the discussion full circle. Victim impact is unconstitutional because it precludes the court from giving weight to legitimate statutory and nonstatutory mitigation. It reduces the weight, not because it tends to make the mitigation more or less probable, but rather it does so because the victim's death "represents a unique loss to society, and in particular, to his family." As such, it is not relevant to mitigation. It may be too late to believe that victim impact information will not be admitted at the capital sentencing phase; however, we should vigorously challenge the methods used. The defense, under this method, has a dual burden: it must now show that mitigation is sufficiently substantial to call for leniency *and* sufficiently substantial to outweigh the psychological, physical, and emotional trauma to the victims.[24] In many close cases, the dual burden may be impossible to satisfy.

1. 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991).

2. 182 Ariz. 290, 896 P.2d 830 (1995).

3. 183 Ariz. 368, 386-387, 904 P.2d 437 (1999).

4. 183 Ariz. at 386.

5. A.R.S. § 13-702(C)(9) provides, "The physical, emotional, and financial harm caused to the victim or, if the victim has died as a result of the conduct of the defendant, the emotional and financial harm caused to the victim's immediate family."

6. A.R.S. § 13-702(E) provides, "The court in imposing sentence shall consider the evidence and opinions presented by the victim or the victim's immediate family at any aggravation or mitigation proceeding or in the presentence report."

7. 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

8. 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

9. 865 F.2d 1011, 1041 (9th Cir. 1988).

10. 492 U.S. 302, 109 S.Ct. 2934, 111 L.Ed.2d 511 (1990).

11. 111 S.Ct. at 2608.

12. *Lockett*, 98 S.Ct. at 2965; *Eddings*, 102 S.Ct. at 879; and *Penry*, 109 S.Ct. at 2952.

13. *State v. Jimenz*, 165 Ariz. 444, 799 P.2d 785 (1990) [victim was a young child] and *State v. Stuard*, 176 Ariz. 589, 863 P.2d 881 (1993) [victims were three elderly women].

14. *State v. Marlow*, 165 Ariz. 65,72, 786 P.2d 395 (1989); *State v. Tittle*, 147 Ariz. 339, 345,

710 P.2d 449 (1985).

15. 431 U.S. 633, 97 S.Ct. 1993, 52 L.Ed.2d 637 (1977).

16. 483 U.S. 66, 107 S.Ct. 2716, 97 L.Ed.2d 56 (1987).

17. *State v. Herrera*, 174 Ariz. 387, 850 P.2d 100 (1993).

18. 183 Ariz. at 386.

19. A motion to seal the presentence report is available from author.

20. A motion *in limine* to preclude victim impact evidence is available from author.

21. A.R.S. § 13-703(C) provides in part, "The prosecution and the defendant shall be permitted to rebut any information received at the hearing and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the circumstances included in subsections F and G of this section."

22. *State v. Schurz*, 176 Ariz. 46, 859 P.2d 156 (1993).

23. 158 Ariz. 232, 762 P.2d 519 (1989). In *State v. Harrison* 306 Ariz. Ad. Rep. 30 (1999) there is an excellent discussion in a noncapital setting. The same rationale would be equally applicable when the court evaluates [weighs] victim impact evidence.

24. I would like to thank Brent Graham for reviewing the article. Mr. Graham originally developed a similar argument on how A.R.S. § 13-703 (F)(10) was a move back to mandatory sentencing. See *Sumner v. Shuman*, supra.